

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

KAREN JENSEN
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TREY RICHARDSON,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee.

)
)
)
)
)
)
)
)
)
)

No. 49A02-0603-CR-165

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 2
The Honorable Robert Altice, Judge
Cause No. 49G02-0502-MR-019119

January 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following a jury trial, Appellant, Trey Richardson, was convicted of Murder, a felony. Upon appeal, Richardson presents two issues for our review: (1) whether the trial court abused its discretion in admitting evidence in violation of Indiana Evidence Rule 404(b); and (2) whether he received ineffective assistance of trial counsel.

We affirm.

Prior to January of 2005, Crystal Freeman had known Darrell Graham for many years. Freeman had also known Richardson for a couple of months as she would buy drugs from him approximately three times a week. Freeman would meet Richardson at a house located at 516 East 33rd Street, which was located between Ruckle Street and Central Avenue in Indianapolis. On January 12, 2005, Freeman saw Richardson, along with several other individuals at this house. Taffia Mays, Graham's girlfriend and the mother of his two children, also saw Richardson at this house around 5:00 or 6:00 p.m. on January 12. After Mays and Patricia Gibbs (also known as "Susie") left the house together, Gibbs told Mays and a man that Graham was planning to commit a robbery at the house that evening. Graham had attempted to do so a week earlier, showing up with a gun, but Gibbs had been the only person present and the attempt was aborted.

Around 4:00 a.m. on January 13, Freeman was in the vicinity of the house on 33rd Street when she saw Graham walking down the street. Graham asked Freeman if she knew where Mays was, and Freeman told Graham that she had seen Mays at the house earlier that evening. Graham then asked Freeman if she knew who was in the house on 33rd Street. Shortly thereafter, Freeman saw Graham walk up to the house, knock, and then enter the house. A few minutes later, Freeman saw Graham walking down the street

again. Richardson and two other men came from between two houses and called to Graham. Richardson then fired four to five shots at Graham. A bullet entered the left side of Graham's back, passed through his chest cavity, piercing his left lung and both ventricles of his heart, and exited through his rib cage, causing extensive internal hemorrhaging and ultimately Graham's death.

Police officers dispatched to the scene on a report of shots fired initially found nothing unusual. A short time later, officers returned to the scene where they discovered Graham's dead body lying face down on the sidewalk on Ruckle Street. Detectives at the scene learned that Freeman may have information about the shooting. Freeman was eventually picked up by a police officer and taken to police headquarters. Freeman immediately told Detective Thomas Lehn that Richardson shot Graham. After Lehn's interview with Freeman, Detective Ronald Gray transported Freeman to the scene of the shooting where she described where she was standing when the shooting occurred and where Richardson was located. Later, Detective Gray returned to the scene, and near the location where Freeman indicated Richardson was standing when he fired the shots, Detective Gray found five spent shell casings on the street. Two of the casings were .9 mm and the other three were .380 caliber casings, all fired from a single gun. Upon being shown a photo array, Freeman identified Richardson as the shooter.

On February 9, 2005, the State charged Richardson with murder. Prior to trial, Richardson filed a motion in limine to exclude any Rule 404(b) evidence and specifically sought to exclude evidence related to his drug dealing or drug involvement. In response, the State asserted that Richardson's drug dealing was "contemporaneous with [the

murder] and it's the motive for the murder.” Transcript at 9. The trial court ruled that the State could introduce limited evidence of Richardson’s drug dealing because it was relevant to motive. A jury trial was held January 9 through 11, 2006. At the conclusion of the evidence, the jury found Richardson guilty of murder. On February 1, 2006, the trial court sentenced Richardson to fifty-five years imprisonment.

Upon appeal, Richardson first argues that the trial court improperly admitted evidence related to his drug dealing in violation of Indiana Evidence Rule 404(b). The admissibility of evidence lies within the sound discretion of the trial court, and the decision whether to admit evidence will not be reversed absent a showing of manifest abuse of the trial court’s discretion resulting in the denial of a fair trial. Johnson v. State, 722 N.E.2d 382, 383 (Ind. Ct. App. 2000). Rule 404(b) provides, in pertinent part:

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”

Our Supreme Court has set forth the following standard for assessing the admissibility of Rule 404(b) evidence:

“(1) the court must determine that the evidence of other crimes, wrongs, or acts is relevant to a matter at issue other than the defendant’s propensity to commit the charged act; and (2) the court must balance the probative value of the evidence against its prejudicial effect pursuant to Rule 403. When inquiring into relevance, the court may consider any factor it would ordinarily consider under Rule 402.” Hicks v. State, 690 N.E.2d 215, 221 (Ind. 1997) (footnote omitted).

Rule 404(b) was designed to assure that “the State, relying upon evidence of uncharged misconduct, may not punish a person for his character.” Lee v. State, 689 N.E.2d 435,

439 (Ind. 1997) (quoting Wickizer v. State, 626 N.E.2d 795, 797 (Ind. 1993)). The effect of this rule is that evidence is excluded only when it is introduced to prove the “forbidden inference” of demonstrating the defendant’s propensity to commit the charged crime. Herrera v. State, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999).

Following is the entirety of the State’s evidence concerning Richardson’s drug dealing activities: During the trial, the State’s first witness, Freeman, testified that she knew Richardson “[f]rom buying drugs from him.” Transcript at 36. Richardson objected upon Rule 404(b) grounds, but the objection was overruled. During the remainder of Freeman’s direct examination, no other reference was made to drugs or drug dealing activities of Richardson. Indeed, the only reference to drugs came when Freeman testified that she herself had used cocaine on the day in question and that cocaine heightens your senses and increases your awareness.

During Detective Gray’s testimony, the State admitted into evidence, without objection, an audio recording of the conversation between him and Freeman as he drove Freeman around the crime scene. The recording was played for the jury. In it, Freeman refers to the house that Graham entered as the “dope house,” says that Richardson and others sold “dope” out of the house, and stated that Graham was going to get some drugs for her. State’s Exhibit 47. During Detective Lehn’s testimony, he testified, without objection, that Mays told him that the house in question was “a common spot for them to buy their drugs,” but his testimony did not refer to Richardson as the source of the drugs. Transcript at 295-96. When Mays testified that Richardson was a “drug dealer” from

whom she “coped [sic] dope,” the trial court sustained Richardson’s objection to the characterization. Transcript at 343.

At trial and upon appeal, the State argues that evidence of Richardson’s drug dealing was relevant to establish motive for Graham’s murder. The State’s argument is that Richardson killed Graham because Graham had tried to commit robbery at the house a week earlier and, on the night in question, went to the house with a hammer and may have intended another robbery just prior to being shot by Richardson. In its brief, the State asserts that Graham’s conduct provided a strong explanation as to why Richardson would shoot Graham—because Graham tried to rob him or his “business.” State’s Br. at 7. Richardson maintains that the State failed to establish any connection between his alleged drug dealing and his motive to kill Graham and that the State essentially tried him as a drug dealer and as a murderer. We agree with Richardson to the extent that he argues that the State failed to establish how his drug dealing activities were probative of his motive to murder Graham. Indeed, the connection between Richardson’s alleged drug dealing and a motive to murder Graham was tenuous at best. The State did not present evidence which established that Graham knew that Richardson was a drug dealer or that Richardson knew that Graham had attempted robbery at the house on a previous occasion.

Nevertheless, we may affirm the trial court’s decision to admit evidence under Rule 404(b) if it is sustainable on any basis in the record. Barker v. State, 695 N.E.2d 925, 930 (Ind. 1998). Here, evidence of Richardson’s drug dealing was pertinent as it related to Freeman’s identification of Richardson as the shooter. Freeman testified that

she knew Richardson from “buying drugs from him.” Transcript at 36. During its closing argument, the State referred to Freeman’s testimony in the context of arguing that Freeman’s identification of Richardson as the shooter was credible and reliable because she knew him well and that she had no reason to want to get him in trouble. Having determined that the evidence of Richardson’s alleged drug dealing was relevant to a matter at issue other than Richardson’s propensity to commit the charged act, we next consider whether the probative value of such evidence outweighed the prejudicial effect.

As noted above the State introduced very limited evidence of Richardson’s alleged drug dealing activities out of the house on 33rd Street. The evidence of Richardson’s drug dealing activities was elicited by a direct question to Freeman, the State’s only eyewitness, about how she knew the defendant. The State did not elicit further details about Richardson’s alleged drug dealing activities. Richardson’s claim that he was “put on trial for being a drug dealer” and that references to drug dealing “pervade the four hundred page transcript” are not supported by the record. Appellant’s Brief at 12, 13. Indeed, throughout the transcript, the references to the house on 33rd Street as the “dope house” or the “crack house” were made primarily by defense counsel, not the deputy prosecutor. Also, defense witness Patricia Gibbs was the most prolific in her references to the house as a “dope house” and in her description of the drug dealing activities occurring at the house on 33rd Street. Gibbs, however, never identified Richardson as one of the dealers who worked out of the house. Further, we note that the jury was instructed that it was not to consider evidence that Richardson was involved in wrongful conduct other than that charged in the information as proof that Richardson committed

the charged crime of murder. Considering the above, we cannot say that the prejudicial effect of the challenged evidence substantially outweighed its probative value.

Having determined that the evidence of Richardson's alleged drug dealing was pertinent for purposes other than establishing Richardson's propensity to murder Graham, and that the probative value of the evidence was not substantially outweighed by any prejudice, we conclude the admission of limited evidence of Richardson's alleged drug dealing was not in violation of Rule 404(b).

Richardson also argues that he received ineffective assistance of trial counsel.¹ To prevail upon a claim of ineffective assistance of counsel, Richardson must present strong and convincing evidence to overcome the presumption that his counsel's representation was appropriate. See Allen v. State, 743 N.E.2d 1222, 1234 (Ind. Ct. App. 2001), trans. denied. The two-pronged standard for evaluating ineffective assistance of counsel claims was enunciated in Strickland v. Washington, 466 U.S. 668 (1984). A defendant claiming a violation of the right to effective assistance of counsel must first show that counsel's performance was deficient. Strickland, 466 U.S. at 687; Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied, 537 U.S. 839 (2002). This requires a defendant to show that counsel's representation, as a whole, fell below an objective standard of

¹ In support of one of his grounds for his claim of ineffective assistance of trial counsel, Richardson submitted the affidavit of Robert Lee Henry and his own affidavit, neither of which were ever presented to the trial court. Upon the State's motion, this court ordered stricken the above-mentioned affidavits. This attempt to submit additional evidence demonstrates precisely why a post-conviction hearing is normally the preferred forum to adjudicate a claim of ineffective assistance of counsel. See McIntire v. State, 717 N.E.2d 96, 101 (Ind. 1999); Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998), cert. denied, 528 U.S. 861 (1999). Presenting such a claim often requires the development of new facts not present in the trial record. McIntire, 717 N.E.2d at 101. A defendant may decide to raise a claim of ineffectiveness of counsel on direct appeal, but, if so raised, the issue will be foreclosed from collateral review. Id. at 102; Woods, 701 N.E.2d at 1220.

reasonableness² and that the errors were so serious that they resulted in a denial of the right to counsel as guaranteed by the Sixth Amendment. Strickland, 466 U.S. at 687-88; Woods, 701 N.E.2d at 1211.

A defendant must also show that counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687; Timberlake, 753 N.E.2d at 603. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694; Timberlake, 753 N.E.2d at 603.

Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. Strickland, 466 U.S. at 689; Timberlake, 753 N.E.2d at 603. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Timberlake, 753 N.E.2d at 603. The two prongs of the Strickland test are independent inquiries and thus, if it is easier to dispose of a claim upon the ground of lack of prejudice, that course may be followed. Strickland, 466 U.S. at 697; Timberlake, 753 N.E.2d at 603.

The grounds upon which Richardson contends that his trial counsel rendered inadequate assistance include trial counsel's failure to seek a mistrial based upon the admission of Rule 404(b) evidence; failure to object to the admission of State's Exhibit

² Hailing Irving Younger's "Ten Commandments of Cross Examination" to be "an excellent objective standard of reasonable attorney performance," Richardson's appellate counsel suggests that these "commandments" be used in reviewing the performance of all trial attorneys. Appellant's Brief at 15. Richardson's counsel then sets out these "ten commandments." We decline the invitation to adopt such guidelines as the measuring stick for attorney performance. In doing so, we do not cast any adverse reflection upon appellate counsel's creative appellate advocacy.

47 upon hearsay grounds; failure to make other objections or request limiting instructions; failure to call witnesses; and failure to effectively cross-examine witnesses. We address each in turn.

Richardson first argues that his trial counsel was ineffective for failing to move for a mistrial after the State failed to produce evidence which connected Richardson's alleged drug dealing to his motive for the murder. Richardson's argument is essentially another attack on the admission of the evidence concerning his alleged drug dealing activities. Having concluded above that the admission of such evidence did not violate Rule 404(b) and therefore was admissible, Richardson cannot successfully demonstrate that his counsel was ineffective for failing to seek a mistrial or that he was prejudiced thereby.

Richardson next argues that his trial counsel was ineffective for failing to object upon hearsay grounds to the admission of State's Exhibit 47, the recording of Freeman's conversation with Detective Gray as he drove her around the crime scene area. Freeman's statements as recorded in State's Exhibit 47 and played for the jury are largely cumulative of her trial testimony. Therefore, the admission of such does not constitute reversible error. See Martin v. State, 736 N.E.2d 1213, 1219 (Ind. 2000) (holding that the admission of cumulative evidence is harmless and not reversible error).

Moreover, we note that defense counsel used some of Freeman's statements in Exhibit 47 during cross-examination of Freeman and Detective Gray to attack Freeman's credibility in various ways. For example, defense counsel made use of Freeman's statements that she did not want to go to prison and wanted help from officers, tried to

show that Freeman's recounting of the various events was inconsistent with where the spent casings were found, and tried to emphasize the distance at which Freeman claimed to have witnessed the shooter and the shooting. Consistent with the theory of defense that others had motive to murder Graham, defense counsel also used Freeman's recorded statement to Detective Graham that all of the people in the house on 33rd Street were "dope men." Transcript at 215. In addition to being unable to show prejudice from the admission of Exhibit 47, Richardson has also not shown that his counsel's failure to object to such evidence was not a strategic decision, especially given that defense counsel affirmatively used the evidence in an attempt to bolster Richardson's defense. Giving due deference to counsel's strategic decisions, Richardson has not shown that defense counsel was ineffective for failing to object to admission of Exhibit 47.³

Richardson also argues that his trial counsel was ineffective for failing to object upon hearsay grounds to Detective Gray's testimony recounting where Freeman told him the various events occurred. Detective Gray's testimony about what Freeman told him was extremely brief and likely had no impact upon the jury. His testimony concerned the location of the various events and was provided primarily to explain how he went about locating the shell casings. Based upon the foregoing, Richardson has failed to establish prejudice sufficient to find his trial counsel ineffective for failing to object to Detective Gray's testimony.

³ Richardson also argues that defense counsel was ineffective for failing to object when the jury requested to have Exhibit 47 replayed. Again, given defense counsel's use of the contents of that exhibit, defense counsel may have found the replay of Exhibit 47 to be helpful to Richardson's case. Richardson has not shown that his counsel's decision to not object to the replay of Exhibit 47 was not a reasonable strategic decision.

Richardson alleges a host of other inadequacies of his defense counsel, specifically pointing out defense counsel's failure to make various other objections throughout the trial or request limiting instructions. When an ineffective assistance of counsel claim is based upon counsel's failure to object, the petitioner must show that a proper objection would have been sustained. Specht v. State, 838 N.E.2d 1081, 1088 (Ind. Ct. App. 2005), trans. denied. Richardson argues that his counsel was ineffective for failing to object when the State asked Freeman, the State's only eyewitness, a leading question to elicit her identification of Richardson as the shooter. In describing what she saw on the night in question, Freeman testified that "him and two other guys came off between them houses right there." Transcript at 50. Seeking clarification, the State asked, "You say 'him' who do you mean? The Defendant?" Freeman then identified the "him" she had referred to as Richardson. In response to the State's question, "Who was shooting?", Freeman responded that "He was." Transcript at 51. Again seeking clarification, the State asked Freeman whether she was referring to Richardson, and Freeman confirmed that she was. To the extent the State's questions may be considered leading, Richardson has not shown how he was prejudiced. Indeed, throughout her testimony, Freeman identified Richardson as the shooter, identified Richardson out of a photo array, and told the police that Richardson was the shooter. Richardson's trial counsel was not ineffective for failing to object to the form of some of the State's questions.

Richardson maintains that his counsel was ineffective for failing to object to the admissibility of photographs of the crime scene which were taken during the day as they were not accurate representations of the scene at the time of the murder, which occurred

at night. Richardson asserts that if part of the defense strategy was to discredit Freeman's credibility because it was too dark for her to accurately perceive the events as they occurred, his defense counsel should have sought a jury admonition and a limiting instruction advising the jury that the photographs were not accurate depictions of things as they appeared at the time of the offense. Prior to the admission of the photographs, defense counsel asked preliminary questions of witnesses to try to establish that the lighting conditions in the photographs were not identical to the lighting conditions at the time of the shooting. Thus, defense counsel adequately brought this issue to the jury's attention. Moreover, any objection to the photographs would not have been sustained, as the lighting conditions were a factor which would have gone to the weight, not the admissibility of the photographs. See Jenkins v. State, 809 N.E.2d 361, 373 (Ind. Ct. App. 2004) (noting that discrepancies in evidence go to weight, not admissibility), trans. denied.

When the crime scene video which was played for the jury appeared to be lighter than the copy defense counsel had been given, defense counsel objected, albeit belatedly. The trial court overruled the objection finding that such went to the weight of the evidence and not its admissibility. In presenting Richardson's defense, defense counsel tendered into evidence and played for the jury the copy of the crime scene video which she was given. Throughout the trial, counsel consistently maintained and brought to the jury's attention that it was too dark for Freeman to have accurately perceived the events as they occurred or to have identified Richardson as the shooter. Richardson has not

shown how his counsel's performance in these matters was deficient or that he was prejudiced thereby.

Richardson asserts that his counsel was ineffective for failing to object during the State's closing argument when the deputy prosecutor erroneously stated that Freeman had known Richardson for six months when Freeman's testimony was that she had known him for a month or two. Richardson also contends that his counsel should have objected when the deputy prosecutor allegedly misstated the definition of "knowingly." The jury was instructed that the statements of the attorneys were not evidence and that the jury should decide the facts from its own memory of the evidence presented at trial. The jury was also properly instructed on the definition of "knowingly." Given these instructions, it is an entirely reasonable strategic decision for defense counsel to not object to minor misstatements of the evidence or an alleged misstatement of the meaning of "knowing." Richardson has not shown how his counsel's performance regarding these matters was deficient or that he was prejudiced thereby.

Richardson argues that his counsel was ineffective for failing to present favorable testimony through Robert Lee Henry, who, according to Richardson, would have testified that although Richardson was in the area when Graham was shot, Richardson was not the shooter. Richardson also maintains upon appeal that he would have testified on his own behalf had his counsel properly informed him of such right. We agree with the State that there is absolutely nothing in the record which supports the assertion that this purported witness would have provided beneficial testimony or that defense counsel was even

aware of this potential witness.⁴ Likewise, there is absolutely nothing in the record to support Richardson's claim that defense counsel improperly advised him about his right to testify or the possible benefits of doing so.⁵ Without any evidence in the record supporting Richardson's claim, we decline to accept that assertion. See Dickson v. State, 533 N.E.2d 586, 589 (Ind. 1989).

Finally, Richardson argues that his trial counsel failed to effectively cross-examine witnesses. Richardson's appellate counsel criticizes defense counsel's cross-examination through the lens of Younger's above-mentioned "ten commandments." Most of the complaints are without merit. Our review of counsel's cross-examination shows that counsel attempted to make consistent points throughout the trial which supported the theory of defense. Further, defense counsel vigorously attacked the credibility of Freeman, the State's only eyewitness to the crime. As we have recognized before, even experienced defense attorneys may not agree on the best way to present a case. Timberlake, 753 N.E.2d at 603. As the State observes in its brief, "Younger's views on cross-examination should [not] be viewed as the be-all-and-end-all of proper cross-examination." Appellee's Brief at 18. Even the best defense attorneys may break a given set of "rules" on cross-examination for good reason. Here, while it is true that some of defense counsel's cross-examination tactics may have been inconsistent with Younger's

⁴ As earlier stated, by order of this court, Robert Lee Henry's affidavit, which is included in Richardson's appendix, was stricken from the record on appeal.

⁵ In support of this claim, Richardson included his own affidavit to this effect in his appendix. By order of this court, Richardson's affidavit was stricken from the record on appeal.

“ten commandments,” counsel’s cross-examination did not fall below an objective standard of reasonableness.

After reviewing the record, this can be said of defense counsel’s performance. Throughout the course of the trial, counsel attempted to exclude evidence related to Richardson’s drug activities, first through a motion in limine and also by objecting to Freeman’s and Mays’s testimony that Richardson sold them drugs.⁶ Through cross-examination of witnesses and presentation of defense witnesses, counsel sought to present a consistent theory of defense, namely that Richardson was not present at the house on 33rd Street and was not the shooter. Richardson’s counsel also argued that other people had motive to shoot Graham and strongly attacked Freeman’s credibility, the reliability of her identification, and the thoroughness and reliability of the police investigation. We therefore conclude that Richardson has not met his burden to overcome the strong presumption that his counsel rendered adequate assistance.

The judgment of the trial court is affirmed.

ROBB, J., and BARNES, J., concur.

⁶ As noted above, the trial court overruled the objection to Freeman’s testimony, but sustained the objection to Mays’s characterization of Richardson as a drug dealer.